Supreme Court, U.S.
FILED

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IN THE

Supreme Court of the United States

SOON GUAN LEE and SEW MOOI LEE
Husband and Wife

Petitioners

v.

UNITED STATES OF AMERICA

Respondent

on Petition for Writ of Certiorari
to the U.S. Court of Appeals for the 9th Circuit

Case Nos. 99-56154, 99-56155

PETITION FOR WRIT OF CERTIORARI

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CONTENTS REPRODUCED FROM FURNISHED PRETYPED COPY.

QUESTIONS PRESENTED FOR REVIEW

Whether the Immigration Court and Board of Immigration Appeals violated the Due Process Clause in failing to exercise it's judicial function to adjudicate fully the facts and evidence. The Immigration Judge refused to discuss the hardship the U.S. citizen daughter, age six (6) years would sustain if she remains behind in the United States upon the deportation of Petitioners (parents) to Malaysia.

LIST OF PARTIES

1. Petitioners/Appellants: SOON GUAN LEE and SEW MOOI LEE, husband and wife.

2. Appellee/Respondent: DISTRICT DIRECTOR OF THE IMMIGRATION & NATURALIZATION SERVICE, Los Angeles, California, District Office
c/o U.S. Attorney General
Office of Immigration Litigation
Civil Division
Dept. of Justice
P.O. Box 878, Ben Franklin Station
Washington D.C. 20044
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9th Circuit:

The opinion of the U.S. Court of Appeals for the 9th Circuit was not published. A Memorandum of Decision was filed on November 15, 2000 and the Order denying the Petition for Panel Re-hearing and the Petition for Re-hearing En Banc were filed on December 5, 2001. The said opinions are attached hereto and collectively marked as Appendix A, pages 16 - 25.

U.S. District Court:

The opinion of the U.S. District Court denying the Petitioners' Petition for Writ of Habeas Corpus was made by approving and adopting the Magistrate Judges' Report and Recommendation dated May 12, 1999. A copy of which is attached hereto and marked collectively as Appendix B, pages 26 - 40.

Immigration Court:

Executive Office for Immigration Review, Office of the Immigration Judge, Los Angeles, California, Oral Decision of the Immigration Judge dated September 29, 1995. A copy of which is attached hereto and marked as Appendix C, pages 41- 53.

STATEMENT OF JURISDICTIONAL GROUNDS

1. The U.S. Court of Appeals for the 9th Circuit's decision is being appealed and was not published. A Memorandum of Decision was filed on November 15, 2000; and the Order denying the Petition for Panel Re-Hearing and the Petition for Re-Hearing En Banc were filed on December 5, 2001. The said opinions are attached and marked collectively as Appendix A.

2. The opinion of the U.S. District Court Judge denying the Petition for Writ of Habeas Corpus was made by approving and adopting the Magistrate Judges' Report and Recommendation, filed May 12, 1999 and entered by the Clerk of the United States District Court on May 25, 1999. A copy of the U.S. District Court Judges' decision is attached hereto and marked collectively as Appendix B.

3. That the jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THIS CASE

1. **Due Process**

The 5th Amendment Constitution of the United States provides, in pertinent part as follows:.

> "Nor shall any person . . . be deprived of life, liberty, or property, without due process of law";

2. **Suspension of Deportation**

Section 244(a)(1) of the Immigration and Nationality Act, 8 U.S.C. Sec 1254(a)(1), provides, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, if the alien could establish that:

a. He had been continuously, physically present in the United States for not less than 7 years immediately preceding the date of such application;

b. He was a person of good moral character during that period; and

c. Deportation would result in extreme hardship to the alien or to his U.S. citizen or Lawful Permanent Resident spouse, parent or child.

3. **Judicial Review of Orders of Removal**

Section 242(g) of the Immigration & Nationality Act, 8 U.S.C. Section 1252(g) Exclusive jurisdiction. Except as provided in this action and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Chapter.

4. **No Appeal of Discretionary Decisions**
Section 309(c)(4)(E), the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996) ("IIRIRA"):

There shall be no appeal of any discretionary decision under INS Sec 212(c), 212(a), 212(i), 244 (Suspension of Deportation) or 245.

CONCISE STATEMENT OF THE CASE

We are requesting a review of the United States Court of Appeals' and District Court's decision denying the Petition for Writ of Habeas Corpus, for violation of the Due Process Clause of the 5th Amendment of the U.S. Constitution. The Immigration Court refused to consider the hardship to the U.S. citizen daughter, age six (6) years, if she remains behind in the United States, upon the deportation of her parents to Malaysia.

The Immigration Judge refused to adjudicate the case by considering all the facets of the hardship. It refused to exercise its judicial function to declare the law and rights of the parties to a controversy before the Court.

Upon the conclusion of the oral decision of the Immigration Judge, the Immigration Judge asked:

"Mr. Kwan, do you have anything further?"

Answer by Mr. Kwan:

> "Your Honor, I don't believe you considered what the hardship the child would sustain if the parents were required to leave by themselves or if the child remains behind. I think the child would sustain extreme hardship in that event."

Judge:

"Mr. Kwan, then you need to address that in

your Appeal to the Board of Immigration Appeals" (Exc., * page 104, lines 16 - 23)

This interchange of conversation demonstrates that the Immigration Judge refused to carry out his duty to adjudicate the case and to consider all of the facts including the hardship that the U.S. citizen child would sustain should the parents leave her behind in the United States upon their departure from the United States.

The Board of Immigration Appeals also failed to consider the hardship the U.S. citizen child would sustain if she remains behind
upon the deportation of the Petitioners to Malaysia and affirmed the Judgment of the Immigration Court.

This is a violation of the Due Process Clause of the Constitution of the United States to a United States citizen child. The Court has an obligation to adjudicate and to consider all of the hardship the U.S. citizen child would

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* Excerpts of record of Appellant filed in the U.S. Court of Appeals for the 9th Circuit. Case No. 99-56154/55, Soon Guan Lee, A72 915 011 and Sew Mooi Lee, A72 915 012, Petitioners/Appellants v. Roger District Director of Los Angeles District Ofice, Immigration & Naturalization Service, Respondent/Appellee.

sustain, should she be left behind in the United States.[1] We admit that the Petitioners did not state unequivocally that they were going to leave their child behind. They stated various reasons why she cannot go to Malaysia and that they could not bear to be parted from her.

Among some of the testimony of the Petitioners made in the Immigration Court are the following statements:

1. Mrs. Lee stated she may put their daughter up for adoption should they have to leave the United States. It may be they will ask someone to take care of her for them (Exc. Tab 3, p96:20-25).

2. The Judge asked Mrs. Lee,

> "M'am, have you or your husband talked about putting your daughter up for adoption?"

Answer:

> "Well, but see, I don't have any other choice if that should be the case because she is (better) off here and have better education. Over there, she would not get any benefits."

1

Cerrillo-Perez vs. INS., 809 F2d 1419, 1424, (9th Cir., 1987) Salcido-Salcido vs. INS., 138 F3d 1292, 1293, (9th Cir., 1998)

Question by Judge:

"M'am, my question was, have you or your husband talked about putting your daughter up for adoption?"

Answer:

"Well, considering it at the time, but we haven't decided." (Exc. Tab 3, p97:1-10).

3. The trial attorney, on cross-examination of Mrs. Lee:

Question:

"M'am, in your words, what hardship would you face if you were to return to Malaysia?"

Answer:

"Well, my biggest hardship will be that I'll have to be separated from my daughter if she cannot go back to Malaysia with me, and, of course, financially we would also suffer drastically. She would . . . not only that, if we take her with us, she cannot live there. She cannot go to school there. She cannot exist as a person there. She would not get an education."

Question:

"So, are you saying, you will take your daughter with you if you were required to return to Malaysia?"

Answer:

"Well, but you see, even if I want to take her, she's technically not allowed to return to Malaysia with me."

Question:

"I'm not . . I'm not asking you that, M'am. I am asking whether or not you are going to take your daughter if you're required to return to Malaysia?

Answer:

"No, I wish my daughter to stay here."

Question:

"And who . . who do you expect her to stay with?"

Answer:

"Right now, I don't know. I haven't any idea yet. I don't know who I can go to, or what I can do." (Exc. Tab 3, p98:4-23).

4. Mr. Lee, on direct examination, answers the following:

Question:

"Okay now, do you think that your daughter would be able to live in Malaysia?"

Answer:

"No, that is not possible."

Question:

"Why not?"

Answer:

"Because she would not be able to acclimatize herself even to the temperature there. The climate is very severely hot and the sanitary condition is very bad. Lots of mosquitoes, flies and she would not able to live there."

Question:

"Now, have you or your wife discussed whether you would leave your daughter behind in the United States or take her back."

Answer:

"We talked about it, but we may have to leave her, but we haven't decided yet." (Exc.

Tab 3, p101:8-21).

5. The trial attorney, on cross-examination, asked Mr. Lee, the following questions:

Question:

"And I want to ask you, Sir, if you were forced to leave . . or if you were required to leave the United States, would you take your daughter with you?"

Answer:

"We are having a hard time . . our heart is having a problem because we don't want to be separated from her, but at the same time, we realized that she cannot go there to live, and that she needs to stay here for an education, so we are having our problem." (Exc. Tab 3 p102:21 to p103:3)

Based on the statements in answer to the above questions made by the Petitioners in the Court, to the Judge, and to the trial attorney, concerning the issue of the child remaining behind in the United States, it appears to be quite certain that the Petitioners have stated that their daughter cannot go to Malaysia, that she will be better off here in the United States where she can get an education. That she could not be acclimatized to the tropical heat, mosquitoes and flies and out-houses. They have considered the matter of putting their daughter up for adoption, but have not decided

as yet.

That they know that their daughter will have very little opportunity for education due to the fact that she cannot attend the public schools in Malaysia. However, assuming that she could go to public school, she would have a difficult time in learning the Malay language.

That they could not afford private education as the cost is too expensive.

They are undecided how they are going to leave their daughter behind in the United States upon their departure.

That their daughter needs to stay here for an education and so they are having a problem.

For these reasons, it would be reasonable to assume that they child would be left behind and the Immigration Court committed judicial error in failing to discuss hardship the U.S. citizen child would have, should she remain in the United States upon the departure of her parents.

The judicial function is to declare the law and determine the rights of the parties to a controversy before the Court. (Marin Water & Power Co. v. Railroad Commission (1916) 171 Cal 706, 711, 154 P 864, and see generally 16 Am Jur 2d Constitutional Law, Sec 306 et seq.)

Habeas Corpus may be used to challenge denial of a discretionary decision of the Court. Accardi vs. Shaughnessy, 347 U.S. 260, 267 (1951).

The Petitioners always had the option at any time up to their departure date, to allow their U.S. citizen child to remain here, with friends or relatives, or placed for adoption. In which case, the said child would be deprived of the love, guidance and protection of parental care so very necessary for a child in her formative years. The child would be relegated to the status of an orphan.

In the event that the child does accompany the Petitioners to Malaysia back to the home of the Petitioners, it will be back to the village where the female Petitioner was born and raised, with out-houses, dirt roads, lots of mosquitoes and flies, hepatitis, etc. This will create an extreme cultural shock to the U.S. citizen child. The U.S. citizen child will have a hard time learning the Malaysian language in the public school if she is allowed to attend. The Petitioners have testified that they will not be able to earn sufficient fund to send their U.S. citizen child to a private school taught in the English language. That they can only earn a minimal wage. None of the relatives of the Petitioners in the Malaysia can render any financial help or furnish them housing. The male Petitioner's relatives are going to Australia. The relatives of the female Petitioner are poor, not well-to-do and cannot render them any financial assistance.

It is certain that the U.S. citizen child, should she accompany the Petitioners to Malaysia, that she will return to the United States as soon as she can cope for herself. If she does return, she will be behind her schoolmates due to the loss of time in Malaysia with her parents. It is certain that she will return to the United States during the ages of 13 to 15 years at the latest, to attend high school and continue onto university. She needs to avail herself of the American

educational institutions and health facilities. It is her birthright.

She will return to await the time she can petition her parents to return to the United States. She can petition for her parents to come back to the United States at age 21 subject to the processing delays that the usual person will encounter in petitioning for the parents to return to the United States with the U.S. Immigration & Naturalization Service and the American Consulate General of Malaysia. It is doubtful that the parents can return to the United States within the normal processing time which is of about at least 1 year or more. They will be excluded for 10 years.

DIRECT AND CONCISE ARGUMENT AND FOR FINDING THE REASONS RELIED OF FOR ALLOWANCE OF THE WRIT

A Petition for Writ of Certiorari should be granted due to the failure of the Immigration Court and the Board of Immigration Appeals to adjudicate, and to consider, the hardship the U.S. citizen child would face in remaining behind in the United States by herself.

This is not a Petition for Writ of Certiorari to correct an error in erroneous factual findings, but for the refusal of the Immigration Court to function and to execute its' duty to adjudicate, to weigh the hardship evidence fully, and to reach a reasoned and just decision.[2]

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Dated: Feb. 20, 2002 Respectfully submitted,

By: _____

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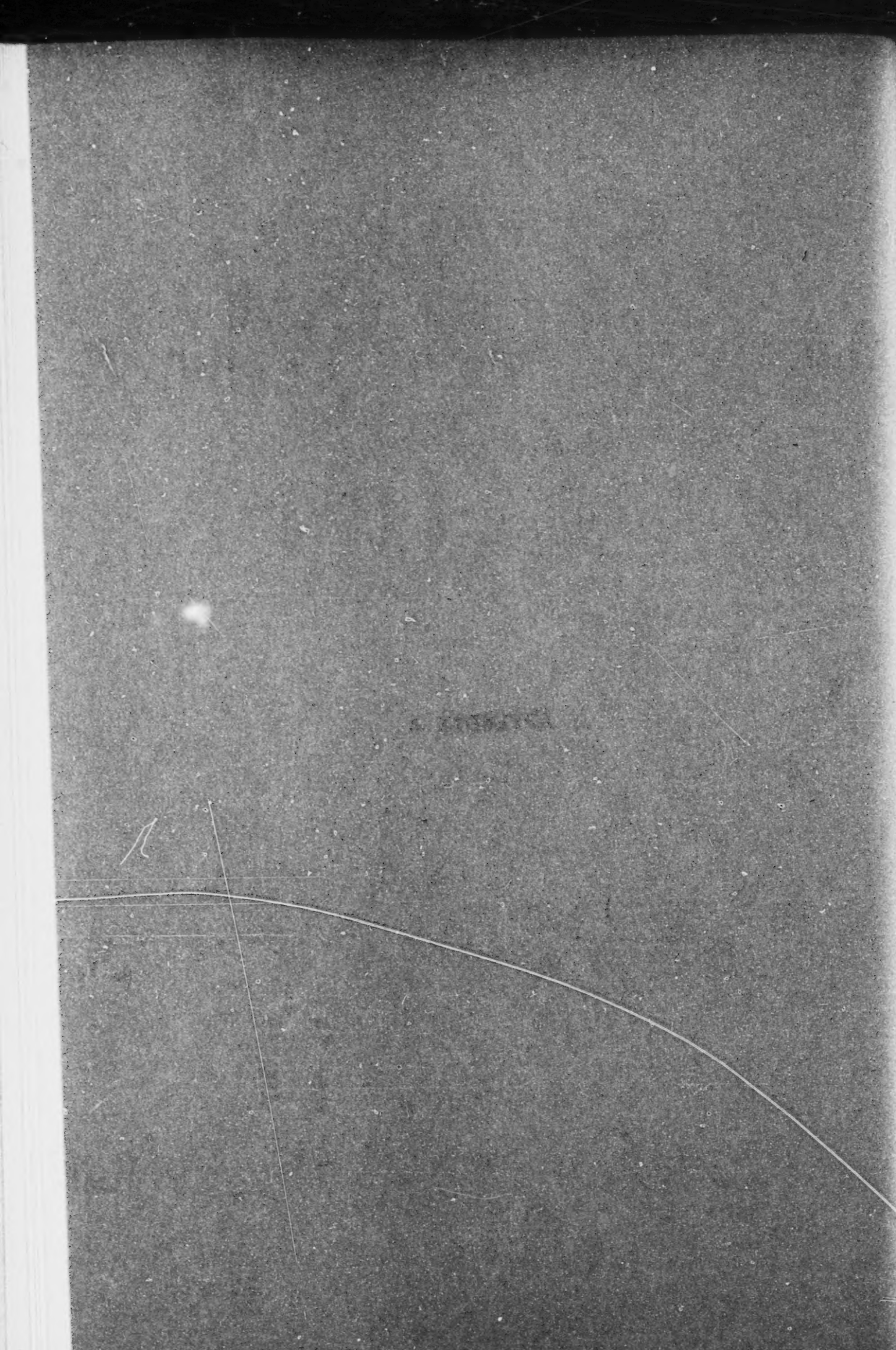
Los Angeles, CA 90010-2512

Cerrillo Perez vs. INS, 809 F2d 1427
Salcido-Salcido vs. INS, 138 F2d 1293-94

APPENDIX A



APPENDIX A

9th Circuit Court, Memorandum filed November 15, 2000 and Petition for Panel Re-hearing and Hearing En Banc denied December 5, 2001.

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
95 Seventh Street, P.O. Box 193939
San Francisco, CA 94119-3939

December 14, 2001

USDC, Los Angeles
Central District of California, Los Angeles
Office of the Clerk
312 North Spring Street
Los Angeles, CA 90012

C.A. No.	TITLE	AGENCY/ D.C. NO.
99-56154	Lee v. Rogers	CV-98-06837-WMB
99-56155	Lee v. Rogers	CV-98-06842-WMB

Dear Clerk:

The following document(s) in the above listed cause(s) is (are) being sent to you under cover of this letter. Counsel are being served with a copy of this letter only.

[x] Certified copy of the Decree of the Court
[ ] Judgment of the National Labor Relations Board
[ ] Certified copy of the Entry of Dismissal

The record on appeal will follow under separate cover.

Please acknowledge receipt on the enclosed copy of this letter.

Very truly yours,
Cathy A. Catterson
Clerk of Court

By: s/Eliza Lau
Deputy Clerk

Enclosure(s)
cc: ALL COUNSEL, WITHOUT ENCLOSURES

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[FILED Dec -5 2001]
Cathy A. Catterson, Clerk
U.S. COURT OF APPEALS]

SOON GUAN LEE; SEW MOOI LEE,	) 99-56154, 99-56155
Petitioners-Appellants,	) DC No. CV-98-06837-WMB
	) CV-98-06842-WMB
v.	)
	)
RICHARD K. ROGERS, District Director, Immigration & Naturalization Service,	) ORDER
Respondent-Appellee.	)

Before: SCHROEDER, Chief Judge, BEEZER and HAWKINS, Circuit Judges

The panel has noted unanimously to deny the petition for panel rehearing. Chief Judge Schroeder and Judge Hawkins vote to deny the petition for rehearing en banc and Judge Beezer so recommends.

The full court has been advised of the petition for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Filed Nov. 15 2000
Cathy A. Catterson, Clerk
U.S. COURT OF APPEALS]

SOON GUAN LEE; SEW MOOI LEE, Petitioners-Appellants, v. RICHARD K. ROGERS, District Director, Immigration & Naturalization Service, Respondent-Appellee.	) 99-56154, 99-56155) DC No. CV-98-06837-WMB) CV-98-06842-WMB) MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
William M. Byrne, Jr., Senior District Judge, Presiding

Argued and Submitted September 11, 2000
Seattle, Washington

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir.R. 36-3

Before: SCHROEDER, BEEZER and HAWKINS, Circuit Judges

Soon Guan Lee and his wife Sew Mooi Lee appeal the district court's denial of their 28 U.S.C. Section 2241 habeas corpus petitions. The petitions challenge the Board of Immigration Appeals' ("BIA") dismissal of their appeal from an immigration judge's ("IJ") denial of their applications for suspension of deportation under former Immigration and Nationality Act ("INA") Section 244(a), 8 U.S.C. Section 1254(a). The Lees argue (1) that the IJ and the BIA abused their discretion in failing to consider the hardship to the Lees' daughter, were the child to remain in the United States; and (2) that failure to consider this factor constituted a denial of due process. We have jurisdiction pursuant to 28 U.S.C. Sections 1291 and 2253(a). We affirm.

The government argues that 8 U.S.C. Section 1252(g) precludes federal courts from exercising jurisdiction over the Lees' 28 U.S.C. Section 2241 habeas petitions. See Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") Section 306(c)(1) (applying Section 1252(g) to transitional cases). The district court assumed without deciding that it retained its general habeas jurisdiction pursuant to Section 2241. We review the district court's jurisdictional decision de novo. See Abboud v. INS, 140 F.3d 843, 846 (9th Cir. 1998).

We have recently concluded that neither IIRIRA's transitional rules nor its permanent rules repeal general

habeas jurisdiction pursuant to Section 2241.[1] See Barapind v. Reno, No. 99-16668, 2000 WL 1210050, at *1, *8 (9th Cir. Aug. 28, 2000); Flores-Miramontes v. INS, 212 F.3d 1133, 1136-38 (9th Cir. 2000); Magana-Pizano v. INS, 200 F.3d 603, 609 (9th Cir. 1999).

Section 2241 habeas review extends to both constitutional and statutory claims. See Magana-Pizano, 200 F.3d at 609. We do not limit habeas review in immigration cases to criminal aliens or to those in actual physical INS custody. See Sulit v. Schiltgen, 213 F.3d 449, 452-53 (9th Cir. 2000) (reviewing under Section 2241 due process and equitable estoppel claims of non-criminal alien not in physical custody of the INS).

II

Exercising habeas jurisdiction, we consider whether the Lees' claims are within the scope of Section 2241 review. We review de novo a district court's grant or denial of a Section 2241 habeas corpus petition. See Cornejo-Barreto v. Seifert, 218 F.3d 1004, 1009 (9th Cir. 2000).

The Lees' claim that the IJ and the BIA abused their discretion in analyzing whether the Lees would experience "extreme hardship" upon deportation essentially duplicates the one presented in their petition for review. Because IIRIRA Section 309(c)(4)(E) deprives us of jurisdiction to

---

1 We do not need to decide whether the 1996 amendments to the INA violate the Suspension Clause of the Constitution. See U.S. Const. Art. I, Section 9, cl.2.

review discretionary decisions of the BIA, we dismissed the Lees' petition for review. See Lee v. INS, 1998 WL 276849, at *1 (9th Cir. May 22, 1998) (unpublished).

Our habeas jurisdiction following the 1996 amendments to the INA does not extend to this claim. Other circuits have noted that the scope of habeas review for aliens under Section 2241 is more limited than the habeas review available under the INA from 1961-1996; "only questions of pure law" and those not implicating factual or discretionary issues are to be addressed. See Bowrin v. INS, 194 F.3d 483, 490 (4th Cir. 1999). At base, the Lees challenge the IJ's and BIA's discretionary factual determination that neither they nor their child would suffer extreme hardship. Because this abuse of discretion claim does not raise a question of pure law, it falls outside the scope of review available under Section 2241. We affirm the district court's dismissal for want of subject matter jurisdiction.

The Lees' due process claim also falls outside the scope of Section 2241 habeas review available under IIRIRA's transitional rules. Prior to the 1996 amendments to the INA, we held that "an alien may petition for habeas review . . . only if the issues raised . . . had not and could not have been determined in a prior judicial proceeding." Nakaranurack v. United States, 68 F.3d 290, 294 (9th Cir. 1995). Other circuits have explicitly recognized this limitation post-AEDPA and IIRIRA. See, e.g., Wallace v. Reno, 194 F.3d 279, 285 (1st Cir. 1999) (concluding that "nothing . . . precludes deportees governed by the IIRIRA transitional rules from challenging their final deportation orders through habeas where they have no other way to assert in court that their deportation is contrary to the Constitution

or laws of the United States"); Requena-Rodriguez v. Pasquarell, 190 F.3d 299, 305 (5th Cir. 1999) (holding that Section 2241 habeas jurisdiction under the transitional rules encompasses "constitutional and statutory challenges if those challenges cannot be considered on direct review by the court of appeals").

The Lees could have raised their due process claim on direct appeal in their petition for review. See Antonio-Cruz v. INS, 147 F.3d 1129, 1130 (9th Cir. 1998) (considering petition for review that raised due process challenges to immigration decisions governed by the transitional rules). The district court lacked subject matter jurisdiction to consider this claim in a petition for habeas review.

AFFIRMED.

[A true copy
CATHY A. CATTERSON
Clerk of Court
ATTEST
Dec. 14, 2001

By: s/Eliza Lau, Deputy Clerk]

APPENDIX B

APPENDIX B

U.S. District Court. The Opinion of the U.S. District Court Judge denying the Petitioners' Petition for Writ of Habeas Corpus by Approving and Adopting the Magistrate Judges' Report and Recommendation, dated May 12, 1999.

[Filed May 12, 1999 by Deputy
Clerk, U.S. District Court
Central District of California]

[Entered by Deputy
Clerk, U.S. District Court
May 25, 1999
Central District of California]

[Lodged by Deputy
Clerk, U.S. District Court
May 8, 1999
Central District of California
Eastern Division]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOON GUAN LEE,	) Case No. CV 98-6837-WMB(VAP)
	)
Petitioner,	) ORDER ADOPTING FINDINGS,
	) CONCLUSIONS AND
v.	) RECOMMENDATIONS OF
	) UNITED STATES MAGISTRATE
RICHARD K.	) JUDGE
ROGERS	)
Respondent.	)This constitutes notice of entry as
	) required by FRCP, Rule 77(d).

Pursuant to 28 U.S.C. Section 636, the Court has reviewed the Petition, all of the records herein and the attached Report and Recommendation of United States Magistrate Judge. The Court approves and adopts the Magistrate Judge's Report and Recommendation.

IT IS ORDERED that Judgment be entered denying the Petition with prejudice.

IT IS FURTHER ORDERED that the Clerk serve copies of this Order, the Magistrate Judge's Report and Recommendation and the Judgment herein by United States mail on counsel for Petitioner and Respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: May 12, 1999

s/William M. Byrne, Jr.

WILLIAM M. BYRNE, Jr.
UNITED STATES DISTRICT
JUDGE

[Filed by Deputy
Clerk, U.S. District Court
April 8, 1999
Central District of California
Eastern Division]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOON GUAN LEE,	) Case No. CV 98-6837-WMB(VAP)
	)
Petitioner,	) REPORT AND
	) RECOMMENDATION OF
v.	) UNITED STATES
	) MAGISTRATE JUDGE
RICHARD K.	)
ROGERS,	)
Respondent.	)
	)

This Report and Recommendation is submitted to the Honorable William M. Byrne, Jr., United States District Judge, pursuant to the provisions of 28 U.S.C. Section 636 and General Order 194 of the United States District Court for the Central District of California.

I. SUMMARY OF PROCEEDINGS

On August 20, 1998, Petitioner filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. Section 2241. Petitioner challenges a deportation order issued by the

Immigration and Naturalization Service ("INS").[1] Respondent filed a Response on October 28, 1998. Petitioner filed a Traverse on November 23, 1998. For the following reasons, the Magistrate Judge recommends the Petition be denied.

II. BACKGROUND

Petitioner, a citizen of Malaysia, entered the United States on September 22, 1986, with his wife. [Response, exhibits 1 & 2.] Although they were admitted as nonimmigrant visitors, they remained in the United States without authorization, living in Hawthorne, California. [Response, exhibits 1 & 3.] In April 1989, Petitioner's wife gave birth to a daughter, who is a United States citizen. [Response, exhibit 6 at 3.]

On June 27, 1995, the INS issued an Order to Petitioner and his wife, directing them to show cause why they should not be deported from the United States. [Response, exhibits 3 & 4.] On September 29, 1995, an Immigration Judge conducted a hearing to consider the applications by Petitioner and his wife for suspension of deportation.[2] [Response, exhibit 5 at 8.]

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1 In a related case, Petitioner's wife also filed a petition for writ of habeas corpus challenging an order of deportation. Lee (Sew Mooi) v. Rogers, Case No. CV 98-6842-WMB (VAP).

2 Petitioner's application was governed by 8 U.S.C. Section 1254(a) (1995), which authorized the INS to suspend deportation and adjust the status of certain deportable aliens.

The Immigration Judge made the following findings: Petitioner and his wife admitted the allegations in the order to show cause, and thus were deportable. [Response, exhibit 6 at 1-2.] Since arriving in the United States, Petitioner and his wife had been living with Petitioner's brother. [Response, exhibit 6 at 3.] Petitioner worked as a waiter in a restaurant. [Response, exhibit 6 at 3.] Petitioner's wife worked at home caring for their daughter, and doing volunteer work at the daughter's school. [Response, exhibit 6 at 3.]

Petitioner and his wife testified that it would be difficult for them to find jobs in Malaysia, and that their earnings would be minimal. [Response, exhibit 6 at 3-4.] In addition, the sanitary and health conditions in Malaysia were poor. [Response, exhibit 6 at 4 & 6.] They also explained that their daughter would not be able to attend public school in Malaysia because she was not a Malaysian citizen, and that the cost of private school was prohibitive. [Response, exhibit 6 at 4.] Petitioner's wife stated that the daughter would not be able to stay in Malaysia for more than a few months in any event. [Response, exhibit 6 at 5.] Petitioner and his wife also indicated that they did not know whether their daughter would accompany them to Malaysia. [Response, exhibit 6 at 5-7.]

The Immigration Judge found that Petitioner and his wife satisfied the first two criteria for suspension of deportation because they had been in the United States continuously for more than seven years, and they were of good moral character. [Response, exhibit 6 at 8-9.] The Immigration Judge, however, determined that they did not establish extreme hardship under the third factor. [Response, exhibit 6 at 9.] The Immigration Judge noted that the lower

standard of living in Malaysia did not qualify as extreme hardship. [Response, exhibit 6 at 9-10.] The judge found that Petitioner's daughter would have difficulty learning to speak a language other than English in school in Malaysia. [Response, ex. 6 at 10.] The judge also found that it would be a hardship if the daughter were unable to attend public school in Malaysia, due to the cost of private school. [Response, exhibit 6 at 10.]

Nonetheless, the Immigration Judge held that Petitioner failed to substantiate his claim that his daughter would not be able to attend public school, or that the daughter would not be allowed to enter and remain in Malaysia with her parents as a Malaysian citizen. [Response, ex. 6 at 10-11.] Based on the lack of evidence, the Immigration Judge noted that he was unable to determine what the law and practice was in Malaysia concerning the foreign-born children of Malaysian citizens. [Response, exhibit 6 at 11.]

The Immigration Judge denied the applications by Petitioner and his wife for suspension of deportation and granted their applications for voluntary departure. [Response, exhibit 6 at 12-13.] The Immigration Judge further ordered that if Petitioner did not voluntarily depart as required, he would be deported. [Response, exhibit 6 at 13.] The Board of Immigration Appeals ("BIA") denied Petitioner's appeal on February 28, 1997. [Response, exhibit 7.] The Ninth Circuit Court of Appeals denied Petitioner's petition for review on May 22, 1998, holding that it lacked jurisdiction to consider the petition. [Response, exhibit 9.] On July 24, 1998, the Ninth Circuit denied Petitioner's petition for rehearing and suggestion for rehearing en banc. [Response, exhibit 10.]

III. PETITIONER'S CONTENTIONS

The Petition asserts the following grounds for habeas corpus relief:

(1) The Immigration Judge and the BIA abused their discretion in failing to consider the hardship to Petitioner's daughter if the daughter remained in the United States upon the deportation of her parents to Malaysia. [Petition at 1.]

(2) The Immigration Judge and the BIA violated the due process clause by failing to consider the hardship to Petitioner's daughter if the daughter remained in the United States upon the deportation of her parents to Malaysia. [Petition at 1.]

IV. DISCUSSION

A. JURISDICTION UNDER THE IIRIRA

In 1996, Congress amended the Immigration and Nationality Act ("INA") by enacting the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). Pub. L. No. 104-208, 110 Stat. 3009 (1996). Among other things, the IIRIRA enacted a more restrictive scheme for judicial review of final orders of deportation, codified at 8 U.S.C. Section 1252. See Reno v. American-Arab Anti-Discrimination Committee ("AAADC"), 119 S. Ct. 936, 940 (1999); IIRIRA Section 306(a). Pursuant to the IIRIRA, Section 1252(g) provides:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Chapter.

8 U.S.C. Section 1252(g) (1998); IIRIRA Section 306(a).[3] The amendment of Section 1252(g) applies "without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act." IIRIRA Section 306(c); see Reno v. AAADC, 119 S. Ct. at 940-41. The Supreme Court has interpreted amended Section 1252(g) to apply to strip the federal courts of jurisdiction over "three discrete actions that the Attorney General may take: her 'decision or action' to 'commence proceedings, adjudicate cases, or execute removal orders.'" Reno v. AAADC, 119 S. Ct. at 943 (emphasis in original).

The Attorney General has delegated her authority to adjudicate deportation cases to the INS. See 8 U.S.C. Section 1103 (1998); 8 C.F.R. Section 2.1 (1998). Petitioner's claims require the Court to examine the decision by the Immigration Judge and the BIA to order Petitioner deported, which necessarily implicates the adjudication of

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[3] Under the IIRIRA, "removal" proceedings include both exclusion and deportation proceedings. Kalaw v. INS, 133 F.3d 1147, 1149, n.2 (9th Cir. 1997).

his case. Accordingly, Section 1252(g) bars the court from exercising jurisdiction over the Petition. See Reno v. AADC, 119 S. Ct. at 943-45. Section 1252 does not establish any other basis for this court to exercise jurisdiction over Petitioner's claims.[4]

B. RESIDUAL HABEAS JURISDICTION

Although the Court lacks jurisdiction under Section 1252 over the Petition, Petitioner asserts that habeas corpus jurisdiction exists pursuant to either 28 U.S.C. Section 2241 or the Suspension Clause. See U.S. Const. art. I, Section 9, cl. 2.

Whether a federal court retains habeas corpus jurisdiction to review orders of deportation under Section 2241 or the Suspension Clause following the passage of the IIRIRA is the subject of much debate. The Supreme Court has noted that "[t]here is disagreement on this point in the Courts of Appeals." Reno v. AADC, 119 S. Ct at 942 n.7 (citing Hose v. INS, 141 F.3d 932, 935 (9th Cir.) (Habeas not available), withdrawn and reh'g en banc granted, 161 F.3d 1225 (9th Cir. 1998); Richardson v. Reno, 162 F.3d 1338,

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4 Under the IIRIRA, the proper avenue for challenging a final order of deportation is to file a petition for review of the order with the Ninth Circuit Court of Appeals. See 8 U.S.C. Section 1252(a) & (b) (1998). The IIRIRA, however, further strips the circuit court of jurisdiction to consider a claim challenging the BIA's evaluation of the "extreme hardship" factor in denying an alien's request for suspension of deportation. Kalaw v. INS, 133 F.3d at 1152. For this reason, the Ninth Circuit found that it lacked jurisdiction to consider Petitioner's petition for review. [Response, exhibit 9.]

1356 (11th Cir. 1998), Petition for cert. filed, 67 U.S.L.W. 3561 (U.S. Feb. 23, 1999) (same); Yang v. INS, 109 F.3d 1185, 1195 (7th Cir.), cert. denied sub nom., Katsoulis v. INS, 118 S. Ct. 624 (1997) (same); but see Goncalves v. Reno, 144 F.3d 110, 122 (1st Cir. 1998), cert. denied, 119 S. Ct. 1140 (1999) (habeas available); Henderson v. INS, 157 F.3d 106, 117-22 (2d Cir. 1998), cert. denied, 119 S. Ct. 1141 (1999) (same); see also Magana-Pizano v. INS., 152 F.3d 1213, 1220 (9th Cir. 1998), amended 159 F.3d 1217 (9th Cir. 1998) (elimination of habeas unconstitutional), vacated and remanded for further consideration, 119 S. Ct. 1137 (1999); Ramallo v. Reno, 114 F.3d 1210, 1214 (D.C. Cir. 1997), cert. denied, 119 S. Ct. 1139 (1999) (Section 1252(g) removes statutory habeas but leaves "constitutional" habeas intact)).

Furthermore, the state of the law in the Ninth Circuit on this issue is uncertain as of the date of this Report and Recommendation. See Hose v. INS, 141 F.3d 932 (9th Cir.), withdrawn and reh'g en banc granted, 161 F.3d 1225 (9th Cir. 1998); Magana-Pizano v. INS, 152 F.3d 1213 (9th Cir. 1998), amended 159 F.3d 1217 (9th Cir. 1998), vacated and remanded for further consideration, 119 S. Ct. 1137 (1999). In any event, though, it is not necessary to resolve this issue here, because even assuming the Court remains residual habeas jurisdiction to consider the Petition, Petitioner is not entitled to habeas corpus relief.

To prove he is entitled to habeas corpus relief under Section 2241, Petitioner must show that he "is in custody in violation of the Constitution or laws or treaties of the United

States." 28 U.S.C. Section 2241(c)(3) (1998).[5] In claim one, Petitioner asserts that the Immigration Judge and the BIA abused their discretion in failing to consider the hardship to Petitioner's daughter in ruling on Petitioner's Application for suspension of deportation. This claim does not raise an issue of constitutional dimension. See Yang v. INS, 109 F.3d at 1195 (habeas relief is not available for review of discretionary decisions by political branches of government). Therefore, claim one should be denied.

In Claim two, Petitioner asserts that the Immigration Judge and the BIA violated the due process clause by failing to consider the hardship to Petitioner's daughter if the daughter remained in the United States upon the deportation of her parents to Malaysia. To prove such a claim, Petitioner must do more than simply show that the decision to deny his application for suspension of deportation was erroneous. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991).

"Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation. [The Supreme Court], therefore, ha[s] defined the category of

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5 The record indicates that Petitioner has not been incarcerated pending his deportation. Nonetheless, the Ninth Circuit has "broadly construed 'in custody' to apply to situations in which an alien is not suffering any actual physical detention; i.e., so long as he is subject to a final order of deportation, an alien is deemed to be 'in custody' for purposes of the INA, and therefore may petition a district court for habeas review of that deportation order." Nakaranurack v. United States, 68 F.3d 290, 293 (9th Cir. 1995).

infractions that violate 'fundamental fairness' very narrowly." Dowling v. United States, 493 U.S. 342, 352 (1990); see Estelle v. McGuire, 502 U.S. at 72-73. In evaluating an alleged violation of due process, judges "are to determine only whether the action complained of . . . violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' and which define 'the community's sense of fair play and decency.'" Dowling v. United States, 493 U.S. at 353 (internal citations omitted).

In considering an application for suspension of deportation, the INS must consider the hardship caused by the separation of the alien from his or her children living in the United States. Salcido-Salcido v. INS, 138 F.3D 1292, 1293 (9th Cir. 1998); Perez v. INS, 96 F.3d 390, 392-93 (9th Cir. 1996); Cerrillo-Perez v. INS, 809 F.2d 1419, 1424 (9th Cir. 1987). The BIA abuses its discretion when it fails to consider the hardship caused by family separation when it is presented with evidence that a parent intends to leave a child in the United States, as well as evidence of the arrangements made for the care of the child. See Salcido-Salcido v. INS, 138 F.3d at 1293-94; Perez v. INS, 96 F.3d at 393; Cerrillo-Perez v. INS, 809 F.2d at 1427.[6]

During the hearing to consider Petitioner's application for suspension of deportation, Petitioner's wife testified that if their daughter returned to Malaysia, the

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6 Although these cases involved the direct review of the BIA's decisions by the circuit court, they are instructive in considering Petitioner's claim on collateral review.

Malaysian government would not permit the daughter to stay for more than six months. [Traverse, ex. A at 33.] Petitioner and his wife testified that they had discussed leaving their daughter in the United States, but they had not decided what to do. [Traverse, exhibit A at 34, 41, 49.] Petitioner and his wife acknowledged that their daughter would suffer difficulties if she was separated from her parents, and for that reason, they had been unable to decide on the best course of action. [Traverse, ex. A at 34-35, 54-55.] Petitioner's wife, however, stated, "we cannot leave her behind." [Traverse, exhibit A at 35.] Petitioner and his wife also indicated that they had thought about putting their daughter up for adoption in the United States. [Traverse, exhibit A at 35-36, 50.] Petitioner stated, however, that "[w]e couldn't bear to do it. We couldn't bear to be parted from her." [Traverse, exhibit A at 50.]

The testimony by Petitioner and his wife showed that they had not decided whether to leave their daughter in the United States. The evidence indicated that their dilemma was exacerbated by their belief that their daughter would not be able to stay in Malaysia, and would not be able to attend public school there. As discussed above, the Immigration Judge found that Petitioner failed to substantiate these assertions with evidence of the applicable law in Malaysia. [Response, ex. 6 at 10-11.] Similarly, the BIA noted that because Petitioner failed to present sufficient evidence to show that his daughter would be forced to leave Malaysia, it did not give significant weight to Petitioner's claim that he would be separated from his daughter. [Response, Exhibit 7 at 2.]

Petitioner failed to present unequivocal evidence that

he intended to leave his daughter in the United States. He also failed to present sufficient evidence that Malaysian law compelled him to do so. Because Petitioner failed to support adequately his assertion that he would leave his daughter in the United States, he cannot show the Immigration Judge and the BIA violated his due process rights by omitting a discussion of the hardship to Petitioner's daughter if she remained in the United States. See e.g., Perez v. INS, 96 F.3d at 393 (the BIA did not abuse its discretion by failing to consider the hardship caused by family separation, because the parents failed to present adequate proof of their intent to separate from their American-born son). Therefore, claim two should be denied.

V. RECOMMENDATION

For all of the foregoing reasons, the Magistrate Judge recommends the Court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) and directing that judgment be entered denying the Petition with prejudice.

Dated: April 5, 1999

s/Virginia A. Phillips

VIRGINIA A. PHILLIPS
UNITED STATES MAGISTRATE JUDGE

APPENDIX C

APPENDIX C

Oral Decision of Immigration Judge, U.S. Dept. of Justice, Executive Office for Immigration Review, Office of the Immigration Judge, Los Angeles, California, dated September 29, 1995.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
Los Angeles, California

File No.: A72 915 011 - 012 September 29, 1995

In the Matter of	)	
	)	
SOON GUAN LEE	)	IN DEPORTATION
SEW MOI LEE	)	PROCEEDINGS
	)	
Respondents	)	
	)	

CHARGE: Section 241(a)(1)(B) of the Act - overstay.

APPLICATIONS: Section 244(a)(1) of the Act - suspension of deportation and Section 244(e)(1) of the Act - voluntary departure.

ON BEHALF OF RESPONDENTS:

Wellington Y. Kwan, Esquire
3731 Wilshire Blvd., Suite 901
Los Angeles, CA 90010

ON BEHALF OF SERVICE:

Frank Travieso, Esquire
Asst. District Counsel, INS
Los Angeles, California

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondents, in this case a husband and a wife, the wife is 31 years-of-age, the husband is 36 years-of-age, they are both natives and citizens of Malaysia. They were issued an Order to Show Cause, which is dated in each case June 27, 1995. The Order to Show Cause for Mr. Lee is at Exhibit 1. The Order to Show Cause for Mrs. Lee is at Exhibit 2.

At a master calendar hearing on August 29, 1995, the respondents admitted the allegations contained on the Order to Show Cause and, based upon their admissions, the Court finds that deportability has been established by clear, convincing and unequivocal language. The respondents designated Malaysia as the country of deportation.

Because the respondents have admitted deportability, the sole issue before the Court today is the respondents' applications for relief from deportation. In each case, the case of Mr. Lee, his suspension application is at Exhibit 3. In the case of Mrs. Lee, her application for suspension is at Exhibit Number 4. The respondents are also seeking, in the alternative, voluntary departure.

In support of their applications for suspension of deportation, the respondents submitted a document, which the Court has numbered as Exhibit 5 and consisting of approximately 202 pages of documents. The documents are primarily income tax returns, bank statements, auto insurance and renewal receipts, vehicle license renewals, school records of the daughter, declaration statements made by two friends attesting to good moral character and their time in the

United States, as well as passports and birth certificates of the respondents. Exhibit 6 is the birth certificate of Mrs. Lee.

The respondents testified in their case. Mrs. Lee was the first to testify. Her testimony was that she arrived in the United States in 1986 and has no departures. That she is married to Mr. Lee and that they were married on August 6, 1986. There's one child born to the marriage and that child is a female United States citizen, born in the United States in 1989. Respondent, Mrs. Lee, testified that she has no family in the United States. Her husband, however, has a brother and the respondents, Mr. and Mrs. Lee, live with the brother. Her family in Malaysia consist of her parents, two brothers and seven sisters. His family in Malaysia consist of his parents. He has a brother who lives in Australia and who is a citizen of Australia. She has some friends in Malaysia. Her husband has fewer friends in Malaysia. The family routine consist of husband going to work and Mrs. Lee staying home caring for the kid, taking her to school or doing housework. They visit the beach, the park and go shopping. The community activities consist of assisting the school, as it relates to her daughter. Her education includes high school with two years of adult school in the United States. While in Malaysia, the husband was a motorcycle mechanic and, more specifically, a motorped or moped mechanic. He now works as a waiter in a restaurant and has been there for almost eight years. The family relies entirely upon his income for their livelihood since Mrs. Lee does not work.

If returned to Malaysia, she testified it would be hard for her to find work because jobs are hard to find there. Before coming to the United States, she worked by caring for

people and children. If she is returned to Malaysia, she estimates that she would earn approximately $300 per month in Malaysian money, where the currency exchange is 2.5 to 1. She stated that her daughter could not return to Malaysia and attend school there because she is not a Malaysian citizen. If her daughter was to try and to attend private school, it would cost approximately $4,000 U.S. dollars for registration, approximately $6,500 for other fees, to give a total cost of well over $10,000 per year for private school attendance.

If the husband was returned to Malaysia, her testimony and his testimony alike was that he could earn between $600 and $700 in Malaysian money. He does not believe that his family or her family could help either of them out, in the way of tuition payments, rent, food or anything else.

Both testified that the sanitary conditions in Malaysia are very poor. She testified that there are outhouses and that there is a lot of hepatitis B disease, which is very contagious.

She testified that food is very expensive and transportation would have to be by bus. They would not be able to afford a car in Malaysia.

They do not have a home in the United States. They are living with her brother-in-law. As for other property, he owns a Ford Aerostar van worth approximately $6,000 to $7,000 and they own a television. They have no property in Malaysia.

And neither Mr. Lee or Mrs. Lee or their daughter, a

United States citizen, have had any medical problems in the United States in Malaysia. Mrs. Lee did testify that she had pain in her arm because of the dampness in Malaysia and that the situation has not recurred in the United States because the weather is better here.

Their daughter does not understand the Malay language and, if she's returned to Malaysia, that will be a disadvantage for her because the Malay language is spoken in school. She speaks to her daughter in English and Chinese. Her daughter answers in English.

She and her husband both testified that they would be discriminated against in Malaysia because of their Chinese heritage. They will be discriminated in areas of education and jobs.

Mrs. Lee testified that she does not believe that her daughter could stay permanently in Malaysia. According to her, her brother told her that she would be able to stay for maybe a couple of months. The respondents are undecided on whether or not their daughter will accompany them to Malaysia.

While in the United States, Mrs. Lee worked as a housekeeper one time. The job was part-time and she was not required to use English in that job.

He mother in Malaysia is retired. Her father works in a rubber plantation and he cuts the rubber plants. Her sisters are married and they live with their in-laws. While in Malaysia, she also lived with her in-laws, that is she lived with her husband's parents. Her in-laws are retired and are

contemplating a move to Australia to join their son who is an Australian citizen.

Since living in the United States, other than Medical, they have had no public assistance.

As for hardship to her, she cannot stand the thought of separation from her daughter and she believes that her daughter would stay. There also would be the financial hardship to themselves and to their daughter. And there was also the situation that she described where her daughter probably would not be allowed to attend school. The daughter is 6 years-old.

Mr. Lee testified that if he is required to leave the United States, he could possibly gather $20,000 prior to his leaving. The Court notes that he claims to have approximately $32,000 worth of assets, $25,000 of that being in cash, bonds and stocks and another $7,000 in the value of his automobile. This information was derived from the application for suspension of deportation.

Mr. Lee opined that it was not possible for his daughter to live in Malaysia because she would not be acclimatized to the temperature nor sanitary conditions and that there are lots of mosquitoes and flies there. He stated that they hadn't decided the fate of his daughter, that is whether or not she will return with them or stay in the United States.

As for hardship, he stated that he would not be able to support his child if he is in Malaysia and also that there would be financial hardship for him and his wife.

He testified that discrimination in Malaysia would also effect the ability of one to get a business license and that government housing is first given to Malaysian citizens, approximately 80 percent and the rest is distributed between the Chinese and Indian population of Malaysia.

He left Malaysia at the age of 28. When he was there, the sanitary conditions were bad. He does not think they have improved.

He testified that he would leave voluntarily, timely and at this own expense. That he has no arrests or convictions on the United States or anywhere. Finally, he testified that his parents are possibly going to Australia within the next year.

APPLICABLE LAW

Suspension of deportation is a form of relief from deportation which enables an alien to stay in the United States as a lawful permanent resident. The Act provides that the Attorney General may grant suspension of deportation to an alien who establishes that he has been physically present in the United States for a continuous period of at least seven years immediately prior to the date of making his application. Two, he has been a person of good moral character during that time. And, three, his deportation would result in extreme hardship to himself or his spouse, parent or child, provided that they are citizens of the United States or lawful permanent residents. Finally, suspension of deportation is a discretionary from of relief. Hence, an alien will not be granted relief unless he can demonstrate to the satisfaction of the Immigration Judge that his case merits a

favorable exercise of discretion.

ANALYSIS

CONTINUOUS PHYSICAL PRESENCE

The respondents have been in the United States since 1986. This is their testimony. This is the allegation contained in the Order to Show Cause and this is the evidence submitted by them in Exhibit 5, which consist of their income tax returns and the declarations from people who know them in the United States. Therefore, the Court finds that the respondents have been in the United States for the minimum time required for suspension of deportation, which is, in this case, seven years.

GOOD MORAL CHARACTER

An applicant for suspension of deportation carries the burden of establishing his good moral character for the requisite period of time, in this case seven years. Based upon the respondents' testimony, the stipulation by the Government and the declaration from people who know them, as contained in Exhibit 5, the Court finds that the respondents have the requisite good moral character for the seven years minimum required.

EXTREME HARDSHIP

Under Section 244(a)(1), a showing of extreme hardship is required. Extreme hardship is interpreted as more than the usual hardship experienced by most aliens sent back to their native country. An alien's readjustment to

living in his homeland is not considered extreme hardship since it is a hardship experienced by a majority of persons who ever lived abroad. The plain language of the term extreme hardship indicates its exceptional nature and that it would be construed narrowly.

In determining whether or not extreme hardship exists in this case, the Court has considered the following:

The economic situation of the respondents in the United States, whereby they are able to support themselves on the income of the male respondent alone, their standard of living in the United States is, according to their testimony, better than what they could expect in Malaysia, employment in the United States pays the male respondent more than he thinks he would be able to earn in Malaysia.

In other words, the standard of living for the respondents would be less in Malaysia than it would be in the United States. However, the Court does not see this as being extreme hardship, it would be adjustment problems and hardship for a period of time until they were able to adjust to the manner in which they lived prior to coming to the United States.

Children. The Court recognizes that the respondents have one United States daughter who is 6 years old. That daughter speaks English. Although she is spoken to by her parents in Chinese or the Cantonese language, the daughter responds in the English language, indicating that she understand the Chinese language but, as her father indicated, she refuses to speak that language. The hardship that would result to the child, if she is returned to Malaysia, would be

that she would have difficulty adjusting to school, if she is to attend public school and if that school is taught in a language other than English. However, the respondents indicated that they do not believe that she could attend public school and that they would have to pay for private school. The private school would cost them in excess of $10,000 a year. This is a hardship. However, the Court is not convinced nor has it been established, as to a degree of certainty, that the child, first of all, could not attend school in Malaysia, that the child is not a Malaysian citizen and that the child would not be allowed to enter and remain in Malaysia with her parents as a Malaysian citizen. The problems that the parents spoke of, concerning the child's returnin to Malaysia, have not been supported by documents that v uld have assisted the Court in determining what the law v as in Malaysia and what the practice was in Malaysia as it relates to children born to citizens of Malaysia who were not born in Malaysia. The Court believes that, since the child is of a young age, 6 years-old, that she would be able to adopt and learn the language of Malaysia much better than her parents have been able to learn or adopt to the English language in the United States. The educational opportunities for the child, if returned to Malaysia, have been cited as a grounds for extreme hardship but, as the Court indicated earlier, there has not been established, with a degree of certainty to the Court's liking, that the daughter would not be able to attend school in Malaysia as other Malaysian children would be. The information supplied to the Court by the respondents was information that they received from their relatives in Malaysia. In other words, the respondents, themselves, do not know this to be a fact.

The Court also considered the medical condition of

the respondents, and that being that they were all in good health. Therefore, there would not be a hardship at all.

Emotional hardship is, indeed, a hardship emotionally to leave a residence where you have been for a period of nearly nine years and to go back to a country where the situation, as far as employment, sanitation and education, is less than the standards in the United States. However, this is a hardship that anyone would experience if required to leave the United States for Malaysia. There is nothing that makes this an extreme hardship, however, on the respondents. There is inconvenience that will be accompanying their relocation from the United States to some other place. But, again, this is the normal inconvenience that attends a relocation.

Based upon the Court's discussion of the factors bearing upon hardship to the respondents or their child which includes the fact that they have very few, if any, family ties in the United States and they have very little, if any, property ties in the United States and the property ties they do have, apparently, can be liquidated because they're named in the form of cash, bonds and stocks, the Court finds that extreme hardship has not been shown and, therefore, the following is the order of the Court:

ORDER

IT IS HEREBY ORDERED that the respondents' application for suspension of deportation be and are denied.

IT IS FURTHER ORDERED that the respondents' application for voluntary departure be and is granted. The

respondents are to voluntarily depart the United States without expense to the Government on or before March 29, 1996, or any extensions, as may be granted by the District Director, Immigration and Naturalization Service and under whatever conditions the District Director may direct.

FURTHER ORDER

IT IS FURTHER ORDERED that if the respondents fail to depart as required, the above order shall be withdrawn without further notice or proceeding and the following order shall thereupon become immediately effective: The respondents shall be deported to
Malaysia on the charges in the Order to Show Cause.

s/Jimmie Lee Benton

JIMMIE LEE BENTON,
Immigration Judge